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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR and
S. J. UNGAR REALTY AFFILIATES, INC.,
Petitioners,

v.

HON. JAMES J. LEFF,
Justice of the Supreme Court,
New York County,
Respondent.

SIDNEY J. UNGAR,
Petitioner,

v.

NAHIM ISAIAS and WATER FRONT SERVICE STATIONS, INC.,
Respondents.

BRIEF OF RESPONDENT NAHIM ISAIAS AND APPENDIX

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BRIEF OF RESPONDENT NAHIM ISAIAS

Statement

It is to be noted that there are in fact two applications for Writs of Certiorari albeit combined under one cover.

Respondent Isaias shall treat each separately. Under the sub-section "Jurisdictional Objection" *infra,* said re-

spondent makes adequate showing of his litigable interest and thus his right to be heard.

Jurisdictional Objection

(A)

Respondent Nahim Isaias, albeit not named in first entitled above application, is nonetheless a vital and interested party. In substance it is his rights that are sought to be affected.

New York State CPLR, Sec. 7802 (c) provides:

> "where the proceeding is brought to restrain a • • • officer from proceeding without or in excess of jurisdiction in favor of another, *the latter shall be joined as a party.*" (emphasis supplied)

In the New York State Appellate Division whereat petitioners instituted their prohibition proceeding against Justice Leff, respondent Nahim Isaias intervened and filed opposing papers. That proceeding was denied and the petition dismissed by the order of September 21, 1971. Attempted appeal to the New York State Court of Appeals, as of right was dismissed (29 N.Y. 2d 724). Petitioners' application for leave to appeal was denied by order of that court, dated January 5, 1972 (A-1a).

Respondent was heard in both the New York State Appellate Division and the New York State Court of Appeals, as of right, pursuant to the above quoted statute, so at bar, he likewise should be heard.

T. 28, Sec. 2101 (c), USCA, provides that any Writ of Certiorari shall be applied for within ninety days after entry of such judgment.

The judgment of denial and dismissal of the New York State prohibition proceedings was had on September 21,

1971. Thus it is patent that the instant writ application is untimely and should be denied and the writ dismissed. (*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399; *Rust Land etc. Co.* v. *Jackson*, 250 U.S. 71; *Whitsitt* v. *Union Depot Co.*, 122 U.S. 363; *Glasgow Nav. Co.* v. *Munson Steamship Line*, 246 U.S. 647; *Collard* v. *Pittsburgh etc. R. Co.*, 246 U.S. 653.)

Where a state court, as at bar (aside from the untimeliness) denies prohibtion, the only question this court could entertain, if any at all, would be whether the state court erred in deciding a federal question respecting the validity of a statute on which the trial court's jurisdiction was based (*Bandini Petroleum Co.* v. *Superior Court of State of California*, 284 U.S. 8).

Patently, in a foreclosure action, jurisdiction of the New York State Courts depends, not on any federal statute, but only on a New York State statute (*Art. 13, Sec. 1301, et seq., New York State Real Property Actions and Proceedings Law*).

Thus absent any federal question this application for a writ is baseless.

(B)

In the second above entitled application, respondent Nahim Isaias asserts lack of jurisdiction to entertain or grant the instant writ.

Petitioner seeks to apply this writ application to an interim and interlocutory order of the New York State Appellate Division, entered on January 25, 1972.

As shown by petitioners' appendix (4a), that court dismissed two of the three appeals as being non-appealable; in addition to being moot and academic.

The order of July 30, 1971, whereby the New York State Court denied petitioners' motion to have the rent receiver

(appointed pursuant to terms of respondent's mortgage) maintain *status quo*, was unanimously affirmed. That order, as affirmed involves the "housekeeping" and regulatory procedure by a court appointed officer (receiver) concerning property in *custodia legis*. It is hardly a constitutional question under the 14th Amendment. It certainly does not embrace any substantial federal question. It is likewise not within the Congressional intent expressed in T. 28 Sec. 1257 (3), USCA.

Petitioners here are in reality seeking revisory power over the New York State Courts' practice and regulation of its procedure. Such revisory power vests no authority or jurisdiction in this court, as it is patent, that such procedure and practice is not any evasion of constitutional guarantees (*Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies*, 312 U.S. 287; rehearing den. 312 U.S. 715).

This New York State Appellate Division order of January 25, 1972 is but one of the numerous interim-interlocutory procedural orders prior to respondents' final judgment of foreclosure and sale. Finally, the final judgment of foreclosure and sale, is scheduled for argument on May 11, 1972, before the New York State Appellate Division.

Motion to Dismiss

Respondent Nahim Isaias, both as an interested party in the first enumerated above application (as hereinbefore more particularly specified in Subd. A & B of Jurisdictional objection, *supra*), as well as a named respondent in the second enumerated above application, moves to dismiss instant Writ of Certiorari application as: a) untimely; b) involving no federal question; c) not within the jurisdiction, under T. 28, Sec. 1257 (3) USCA.

In this latter aspect, it should be noted that T. 28 Sec. 1257 (3) USCA invokes the condition precedent that only "Final Judgments" rendered by the highest court of a state in which a decision could be had, may be reviewed.

Thus, as to the New York State Prohibition against Justice Leff, we have herein before shown that that application is untimely.

Furthermore, denial was a matter of discretion and thus no law question, either state or federal can or would be involved. In the absence of any opinion, prohibition was denied as a matter of discretion (New York State CPLR 7801 (1)). It is, of course, clear that petitioners' assertion here, concerning any non-final matter can be adequately reviewed upon appeal from the final judgment of foreclosure sale, now before the New York State Appellate Division, for review.

Finally, Rule 21 o this court requires that "the entire record in the court to which certiorari is addressed shall be filed * * *". There has been no agreement by respondent Nahim Isaias, as to non-compliance with said; nor has this court dispensed with compliance.

Examination of the instant writ application readily reveals that *no such entire record*, is being filed; nor has respondent Isaias been served with any such record. All that is submitted is an alleged appendix, which consists of court determinations; the supporting records upon which same are grounded are omitted.

Failure to comply with Rule 21 of this court is therefore fatal to this writ. It should be dismissed.

The New York State Appellate Division order of January 25, 1972 (pet. app. 4a), is *not* a final judgment nor decree; and therefore not within T. 28, Sec. 1257 USCA.

Statement of the Case

Nahim Isaias, owner and holder of a valid real estate mortgage covering land and buildings in New York City, instituted in time honored form and substance, a foreclosure action. A purported settlement thereof, together with related actions, instituted by petitioner except respondent's injunction action (hereinafter described) were allegedly settled. That alleged settlement was the subject of an appeal by respondent. The New York State Appellate Division reversed and its opinion is reported at 37 A.D. 2d 702. Petitioner then elected to pursue a course of conduct which attacked the merits of respondent's foreclosure action. Thus he abandoned the alleged settlement, waived it, and irrevocably elected different remedies. Petitioner did *not* pursue the alleged settlement in any form.

Petitioner's attack on the merits was denied at the trial level and upon appeal, upheld. Said appellate determination is reported at —— A.D.2d —— 326 N.Y.S.2d 291, and in which that court stated that petitioners' "charted" their course.

New York State Supreme Court Justice Leff, by his order of October 29, 1971, once again denied petitioner's motions for enforcement of the alleged settlement; disqualification of himself and the Special New York State Supreme Court Referee McNabb, appointed to hear and report the amount due respondent. Petitioners appealed from that order. The New York State Appellate Division, 1st Judicial Department unanimously affirmed that order, without opinion by its order dated March 27, 1972. Directly involved was once again the often repeated and denied alleged settlement. Such affirmance in favor of respondent lays at rest, that which petitioners now complain about.

In addition to petitioners' prohibition proceeding against Justice Leff, they also sought mandamus. The New York

State Appellate Division likewise denied the relief and dismissed the petition; which is reported at —— A.D. (2d) ——, 326 N.Y.S.2d 292. No further appeal was sought therefrom.

Finally with respect to the second enumerated application above, which concerns itself with the injunction judgment obtained by respondent Isaias, it is now beyond any further judicial review.

During the course of the foreclosure, petitioners attempted to demolish, without permission, the buildings constituting part of the mortgage security.

Respondent Isaias instituted suit in the New York State Supreme Court, to restrain petitioners. A temporary restraining was issued. Thereafter a trial was held and a permanent injunction issued by New York State Supreme Court Justice Loreto, restraining the demolition. Petitioners appealed from both the order and judgment to the New York State Appellate Division.

Respondent moved to dismiss said appeals for failure to perfect same. Both appeals were conditionally dismissed unless perfected for the January 1972 term. They have not been. The said New York State Appellate Division by its two orders dated April 11th, 1972, has finalized the conditional dismissals.

Furthermore, petitioners abandoned their appeal from the final judgment of injunction by stating in their brief, to the New York State Appellate Division, in connection with another and later appeal, concerning vacation of certain orders of Justice Leff dated July 28, 1971,

> ". . . from the order of denial by reason of the pendency of the appeal from the original injunction. • • • Said appeal has already been conditionally dismissed and the appellants (petitioner here) have elected not to perfect same." (p. 8 appellant's reply brief)

That reply brief was submitted to the New York State Appellate Division in the appeal entitled,

NAHIM ISAIAS,

Plaintiff-Respondent,

against

SIDNEY J. UNGAR,

Defendant-Appellant,

and

WATER FRONT SERVICE STATIONS, INC.

Defendant.

Of course, the second above entitled application for a writ is precisely directed in that action, to the order of the New York State Appellate Division order of January 25, 1972 (Appendix p. 4a) refusing vacation of the final judgment of injunction. As heretofore shown said appeal from such final judgment of injunction was finally dismissed by the New York State Appellate Division, by its order of April 11, 1972.

As shown in respondent's attached appendix, petitioners have instituted an action in the District Court of the United States, Southern District of New York, seeking: a) to enforce the alleged settlement; and, b) for a restraining order against the prosecution of the New York State foreclosure action. United States District Judge Weinfeld by his opinion dated January 25, 1972, denied the restraint. Petitioners then purported to amend their complaint and brought on another motion for a stay before United States District Judge McMahon, which is before United States District Judge McMahon, who not only denied petitioners stay, but dismissed the action. (respdts app. p. 21).

Without at further length describing the multiple applications for stays, interim appeals and actions, suffice it to state that there is now on appeal, awaiting determination, respondent's final judgment of foreclosure and sale.

Reasons for Denying the Writs

No valid reason, in either law or fact has been shown by petitioners for the granting of the writs.

Contraiwise, respondent Isaias, has beyond peradventure of doubt shown herein, that no substantial federal question is present. The applications are untimely and without the jurisdiction vested in this court by T. 28 Sec. 1257, USCA.

Much has been set forth in the instant petition, which is irrelevant and *de hors* the record. The glaring omissions of the litigiousity of petitioners becomes apparent from the brief outline above.

It cannot for a moment be assumed that Judge Leff, whose orders and actions have been reviewed by the Appellate Courts and found not wanting either in merit, law or fact, nor any bias, hostility or prejudice, vests in these disappointed litigants the privilege of these writs.

Respondent Isaias does not quarrel with the pronouncements of this court and all other courts, that if bias, prejudice or hostility, *in fact exists,* that disqualification follows.

Respondent Isaias, however, submits that petitioners' unfounded charges and assertions have been reviewed and found non-existent.

There is no substance to petitioners' argument that a settlement was effected. After the reversal (37 A.D. 2d 702) petitioners voluntarily elected such actions and remedies as were mutually exclusive to settlement.

It was such conduct and actions that prompted the New York State Appellate Division to observe that petitioners had,

> "* * * no basis for impeding the progress of the foreclosure action, particularly in *view of the course of action charted by appellant* (petitioners here) subsequent to our previous decision reported at 37 A.D. 2d. 702, * * *" (emphasis and insert supplied) (326 N.Y.S. 2d 291, not yet officially reported).

Such petitioners' actions were waiver, abandonment, estoppel and election of remedies. All such legal propositions were before the New York State Appellate Division when it arrived at the foregoing determination.

Lest there be some misapprehension, not one application, motion hearing, nor appeal went uncontested by petitioners. Thus their argument that a judgment entered without notice or hearings is a fantasy made of whole cloth. It is sophistry in its ultimate.

CONCLUSION

By reason of the foregoing the petition for Writs of Certiorari should be denied and the petitions dismissed.

Respectfully submitted,

EMANUEL THEBNER
369 Lexington Avenue
New York, New York 10017

Counsel to Respondent
Nahim Isaias

Appendix of Respondent Nahim Isias.

ORDER OF THE APPELLATE DIVISION DATED NOVEMBER 4, 1971.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 4, 1971.

Present—Hon. Owen McGivern,
Justice Presiding,
Arthur Markewich,
Francis T. Murphy, Jr.,
Aron Steuer,
George Tilzer,
Justices.

4346
[M-7733]

In the Matter of the Application of Sidney J. Ungar and S. J. Ungar Realty Affiliates, Inc.,

Petitioners,

For an Order Pursuant to Article 78 CPLR

—directed to—

Hon. James J. Leff, Justice of the Supreme Court, New York County,

Respondent.

The above-named petitioners having presented to this Court a petition praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and

Order of the Appellate Division, dated November 4, 1971.

Rules in the nature of mandamus directing respondent to sign a certain proposed order, and directing respondent and Special Referee Frank McNabb to immediately discontinue any further actions or proceedings in the foreclosure action or any related action,

Now, upon reading and filing the notice of application, dated October 4, 1971, with proof of due service thereof, the petition of petitioners, verified October 4, 1971, and the exhibits annexed thereto, and the affidavits of Sidney J. Ungar and the Affidavits of Sidney Zasuly all in support of said petition, and the affidavit of Gilbert L. Offenhartz and the statement of Emanuel Thebner in opposition thereto, and after hearing Mr. Sidney J. Ungar, pro se, and Mr. Sidney Zasuly for the application and Mr. Gilbert L. Offenhartz and Mr. Emanuel Thebner opposed, and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that said application be and the same hereby is denied for the reasons stated in the disposition of concomitant Appeals Nos. 4362-64 decided simultaneously herewith, and the petition dismissed, without costs and without disbursements.

Enter:

HYMAN W. GAMSO
Clerk.

ORDER OF THE APPELLATE DIVISION, DATED DECEMBER 21, 1971.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 21, 1971.

Present—Hon. Owen McGivern,
Justice Presiding,
Arthur Markewich,
Frances T. Murphy, Jr.,
Aron Steuer,
George Tilzer,
Justices.

4605
[M-8101]

In the Matter of the Application of Sidney J. Ungar and S. J. Ungar Realty Affiliates, Inc.,

Petitioners,

For an Order Pursuant to Article 78 CPLR,

—directed to—

Hon. James J. Leff, Justice of the Supreme Court, New York County,

Respondent.

The above-named petitioners having presented a petition, verified November 17, 1971, to this Court, praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and Rules, directing the respondent to sign an order stating that no settlement had been ef-

Order of the Appellate Division, dated December 21, 1971.

fected by Judge Fine of certain underlying actions, directing respondent to disqualify himself from ruling on certain motions below, and for other relief.

And Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent Hon. James J. Leff, Justice of the Supreme Court of the State of New York, having served and filed upon the petitioners on November 29, 1971 an answer to said petition, verified on November 26, 1971,

Now, upon reading and filing the notice of application, dated November 18, 1971, with proof of due service thereof, the petition herein, duly verified on November 17, 1971, and the exhibits annexed thereto, the statement of Sidney Zasuly, statements of Alan S. Liebman, and affidavit of Sidney J. Ungar, all in support of the petition; and the answer of Louis J. Lefkowitz, duly verified on November 26, 1971, and the statements of Joseph Mandell in opposition to the petition; and after hearing Mr. Sidney J. Ungar, appearing pro se, and Mr. Alan S. Liebman for the petition, and Messrs Louis J. Lefkowitz and Joseph Mandell opposed; and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed. Respondent shall recover of petitioners $50 costs and disbursements of this proceeding.

ENTER:

HYMAN W. GAMSO,
Clerk.

ORDER OF THE APPELLATE DIVISION, DATED MARCH 27, 1972.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 27, 1972.

Present—HON. OWEN MCGIVERN, Justice Presiding
ARTHUR MARKEWICH,
THEODORE R. KUPFERMAN,
JAMES B. M. MCNALLY,
ARON STEUER,
Justices.

5115 N

Action #1
Index No.
7499/1968

NAHIM ISAIAS,
Plaintiff-Respondent,

against

DAVID FISCHOFF, et al.,
Defendants,

and

J. J. UNGAR REALTY AFFILIATES, INC.,
Defendant-Appellant.

Action #2
Index No.
6979/1969

SIDNEY J. UNGAR,
Plaintiff-Appellant,

and

Order of the Appellate Division, dated March 27, 1972.

SYLVIA K. MILLER,

Plaintiff,

against

DAVID FISCHOFF, et al.,

Defendant,

and

NAHIM ISAIAS,

Defendant-Respondent.

Action #3
Index No.
19924/1970

NAHIM ISAIAS,

Plaintiff-Respondent,

against

SIDNEY J. UNGAR,

Defendant-Appellant,

and

WATER FRONT SERVICE STATIONS, INC.,

Defendant.

Action #4

JOSEPH MANDEL,

Plaintiff-Respondent,

against

SIDNEY J. UNGAR,

Defendant-Appellant.

Order of the Appellate Division, dated March 27, 1972.

An appeal having been taken to this Court by the appellant in each of the above-captioned actions from an order of the Supreme Court, New York County (Leff, J.), entered on October 29, 1971, which denied a motion made by appellants for a hearing authorized by the Appellate Division on July 1, 1971, on whether a settlement of the above-entitled actions had been made on April 28, 1971, and which order further denied a request that Justice Leff disqualify himself from hearing and determining the said motion for a hearing on whether the above actions had been settled, because of his prejudice against appellant Sidney J. Ungar and Justice Leff's unsolicited prejudgment and finding, without a hearing, in a memorandum opinion by him dated July 29, 1971 and filed July 30, 1971, that the above four actions had not been settled, and that appellants were not entitled to a hearing, and said appeal having been argued by Mr. Alan S. Liebman of counsel for the appellants, and by Mr. Emanuel Thebner of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed and that the respondents recover of the appellants $30 costs and disbursements of this appeal.

ENTER:

HYMAN W. GAMSO,
Clerk.

Decision of U. S. District Judge Weinfeld for the Southern Dist. of N. Y.

'2 Civil 21

A simple foreclosure action, instituted in the Supreme Court of the State of New York by Nahim Isaias (here named as a defendant, but not served with process), wherein Sidney J. Ungar, the plaintiff in this suit, and others were enjoined from demolishing three buildings on the properties which are the subject of the foreclosure, spawned a number of other suits, including one for libel and slander, bringing in their wake a multiplicity of motions in the state courts, and finally this federal action by Ungar based upon diversity jurisdiction.

Plaintiff, upon one cause of action, seeks enforcement by this court of an agreement of settlement allegedly entered into by Isaias and other parties of four actions pending in the state court, and in the event performance cannot be effected, damages in the sum of $150,000, and upon a second cause of action he seeks an additional $150,000 damages, allegedly resulting from the nonperformance of the alleged settlement of the state court actions. The defendants deny any settlement was ever entered into, a position thus far upheld by the state courts. Ungar v. Fischoff, 166 N.Y.L.J. at p. 10 (issue of Aug. 3, 1971). See also Isaias v. Fischoff, 37 App. Div. 2d 702, 322 N.Y.S.2d 967 (1st Dep't 1971).

Plaintiff now seeks a preliminary injunction to enjoin Isaias and his attorney from proceeding with the state foreclosure suit and to direct them to withdraw a motion pending there to confirm the referee's report and for the entry of judgment of foreclosure. Although directed against individuals, what is sought in substance is an injunction by a federal court to stay proceedings in a state court, which may be granted, if warranted, only under the exceptions set forth in the anti-injunction statute—that is, "where necessary in aid of [the federal court's] jurisdic-

tion or to protect or effectuate its judgments". 28 U.S.C. § 2283; see Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970). Plaintiff, entirely apart from establishing that the controversy comes within one of the statutory exceptions, must also make an adequate factual showing of irreparable injury to obtain the extraordinary relief he seeks.

No useful purpose would be served to detail the various proceedings and actions in the state court to date. The foreclosure suit here sought to be enjoined has been the subject of numerous motions, appeals, a writ of prohibition and a writ of mandamus. See Ungar v. Leff, 37 App. Div. 2d 934, 326 N.Y.2d 292 (1st Dep't 1971), motion for leave to appeal denied, —— N.Y.S.2d ——, 167 N.Y.L.J. no. 5 at 2 (issue of Jan. 7, 1972). See also Isaias v. Fischoff, 37 App. Div. 2d 702, 322 N.Y.S.2d 967 (1st Dep't 1971). Thus far, plaintiff appears not to have made much headway in his extensive efforts to stay the foreclosure of the properties in which he has a substantial interest. There are presently pending appeals in the Appellate Division, one of which is to be heard at the March Term. The fact that thus far plaintiff has not prevailed in the state court on his various claims and charges, including rejection of his claim of prejudicial bias on the part of the state court justice who ruled adversely to his contention that an agreement of settlement of the action had been entered into does not, by itself, afford a basis to enjoin the state court from proceeding to final judgment in the foreclosure action. Any claim by plaintiff of alleged infringement of his constitutional or other rights can and should be advanced in the state courts; if and when a final judgment is entered, it is subject to appellate review there and ultimately by the Supreme Court of the United States. As the Supreme Court has recently cautioned: "Proceedings in state courts should normally be allowed to continue unimpaired by in-

tervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970); *cf.* Younger v. Harris, 401 U.S. 37, 43 (1971); Samuels v. Mackell, 401 U.S. 66, 69 (1971).

Plaintiff here, as already noted, seeks money damages upon both claims. The injunction now sought is neither necessary in aid of the court's jurisdiction nor to protect or effectuate its judgments; entirely apart from that deficiency, there has been no factual showing of irreparable injury to justify injunctive relief. It is neither warranted by law nor required by the facts. *Cf.* Jacobs v. Tenney, 321 F. Supp. 937 (S.D.N.Y. 1970).

The motion is denied in all respects.

Dated: New York, N. Y., January 25, 1972.

EDWARD WEINFELD,
United States District Judge.

OPINION, JUDGE MACMAHON.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Pro Se 72 Civ. 21

MEMORANDUM

MACMAHON, *District Judge.*

This is a diversity action in which plaintiff seeks enforcement of an agreement allegedly made in settlement of a number of suits arising from a mortgage foreclosure action in the Supreme Court of the State of New York. Plaintiff's first claim is for specific performance of the settlement agreement or damages in lieu thereof. His second claim is for damages arising from his inability to demolish buildings on the property in question because of a state court injunction, which is still in effect allegedly due to defendants' non-performance of the alleged settlement agreement. Defendant Mandell[1] denies that any settlement was ever agreed upon. Thus far, the New York courts have upheld that contention, and a judgment of foreclosure on the property has been entered.

Plaintiff moves for a preliminary injunction to stay the sale of the property pending the determination of this action. He also moves for leave to amend his complaint against one of the defendants[2] and for an order lifting the state court injunction against the demolition of buildings on the contested property. Defendant Mandell cross-moves for dismissal of the action for failure to state a claim upon which relief may be granted, for lack of subject matter jurisdiction, or because our acceptance of jurisdiction in this action would constitute federal interference with the integrity of the state judicial process.

The dispute stems from a simple foreclosure action which was instituted in the New York courts by defendant Isaias against plaintiff and others and which spawned a number of other actions, including one for defamation brought by defendant Mandell against plaintiff. According to plaintiff, all of these actions were settled by an agreement which he claims was made in April 1971. An order was entered on the alleged settlement, but it was subsequently reversed by the Appellate Division on procedural grounds, the court noting that it was unable to determine whether a settlement had in fact been reached. The court suggested that plaintiff move for a hearing on the existence of a settlement, if he so wished. *Isaias* v. *Fischoff*, 37 App. Div.2d 702 (1st dep't 1971).

On remand, the Supreme Court found, without a hearing, that no settlement had been reached and ordered the foreclosure suit to proceed. Plaintiff made several motions and appeals claiming that he had been deprived of a hearing on the issue of settlement,[3] but the Appellate Division denied them on the ground that plaintiff made an election of remedies in attacking the foreclosure instead of seeking a hearing on the existence of a settlement.

Invoking diversity jurisdiction, plaintiff then brought this action claiming that the state court (a) deprived him of due process by denying a hearing on the existence of a settlement agreement, and (b) impaired the obligation of a valid contract in violation of Article I, Section 10, of the Constitution. Since the institution of this action, the state Supreme Court has entered a final judgment of foreclosure, on which appeal is now pending in the Appellate Division.

We turn, now, to plaintiff's motion for a preliminary injunction staying defendants from selling the property pursuant to the foreclosure judgment.

Although nominally directed against individuals, the requested injunction is actually directed against proceedings in a state court and is, therefore, subject to the anti-in-

junction statute.[4] It is settled that the prohibition of the statute cannot be evaded by addressing the order to the parties or by prohibiting utilization of the results of a completed state proceeding. *Atlantic C. L. R.R.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). Plaintiff, therefore, is not entitled to the extraordinary relief he seeks, unless he shows, first, that his case comes within one of the exceptions to the anti-injunction statute and, second, that he will suffer irreparable harm if injunctive relief is denied.

Plaintiff contends that his case is within the exceptions because an injunction is necessary to effectuate the judgment of the court. However, plaintiff points to a prospective judgment which might have to be protected or effectuated, but the statute refers to an existing final judgment or existing interlocutory decree. *Commerce Oil Refining Corp.* v. *Miner*, 303 F.2d 125 (1st Cir. 1962); *Sperry Rand Corp.* v. *Rothlein*, 288 F.2d 245 (2d Cir. 1961). Plaintiff, thus, fails to bring his case within the exceptions of the anti-injunction statute.

Plaintiff's claim of irreparable injury if an injunction is denied is apparently moot because the Appellate Division has stayed the foreclosure sale pending appeal. Moreover, plaintiff fails to show irreparable injury. His speculative allegations that he will lose his equity on a foreclosure sale and that his damages will be uncertain are plainly insufficient. The motion for a preliminary injunction is, therefore, denied.

We turn to defendant Mandell's motion to dismiss this action in the interest of federal-state comity.

Comity requires that federal courts abstain from interfering with the state judicial process except where that process is not adequate to protect federal rights. *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951).

In the present case, plaintiff fails to show any such inadequacy. His contentions that the state courts have not

considered the issues of the alleged settlement agreement and the alleged violation of his constitutional rights are unfounded, since he admits that both issues have been the focus of a number of motions and appeals in the state courts and will be raised again on the appeal now pending from the final foreclosure judgment.

Plaintiff's lack of success thus far in the state courts is not a sufficient reason for us to intervene by providing an injunction and another avenue for review of the state court's judgment. District courts are not alternative appellate courts for every litigant who loses his case in the state court and comes here crying violation of constitutional rights. Quite the contrary, "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic C. L. R. R.* v. *Brotherhood of Locomotive Eng'rs, supra,* 398 U.S. at 296. If a plaintiff is adversely affected by a state court's decision, he can seek vindication of his federal rights in the state appellate courts and, ultimately, if necessary, in the Supreme Court. Anything less is intolerable if federal-state comity is to have any meaning.

Consequently, since there is no overriding federal interest to protect, we find no reason to interfere with the orderly and comprehensive disposition of this action in the state court.

Accordingly, plaintiff's motions are denied in all respects. Defendant Mandell's cross-motion to dismiss is granted, and there being no just reason for delay, the Clerk of the court is directed to enter judgment dismissing this action.

The foregoing constitutes this court's findings of fact and conclusions of law, as required by Rule 52, Fed.R. Civ.P.

So ordered.

Dated: New York, N. Y., April 20, 1972.

LLOYD F. MCMAHON
United States District Judge

FOOTNOTES

[1] Nahim Isaias, who is also named as a defendant, was served after the action was commenced and after the present motion was argued. He has since made a motion, which is now pending, to quash service upon him.

[2] Defendant Isaias was served with the amended complaint, and thus plaintiff seeks to amend the original complaint only as to defendant Mandell.

[3] Plaintiff also sought a writ of prohibition alleging prejudicial bias by the State Court Justice who ruled that no settlement agreement existed. It was denied by the Appellate Division.

[4] The anti-injunction statute prohibits a federal court from enjoining proceedings in a state court unless Congress has authorized it by statute or unless it is necesary to aid the federal court' jurisdiction or to protect or effectuate its judgments, 28 U.S.C. § 2283.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR and S. J. UNGAR REALTY AFFILIATES, INC.,
Petitioners,

against

HON. JAMES J. LEFF, Justice of the Supreme Court, New York County,
Respondent.

SIDNEY J. UNGAR,
Petitioner,

against

NAHIM ISAIAS and WATER FRONT SERVICE STATIONS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION FIRST DEPARTMENT OF THE SUPREME COURT OF NEW YORK

BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION FIRST DEPARTMENT OF THE SUPREME COURT OF NEW YORK

BRIEF IN OPPOSITION

Statement

This brief will concern itself only with the petition for certiorari in the case of *Ungar* v. *Leff*.

Petitioners seek certiorari to review a determination by the Appellate Division, First Department denying prohibition against respondent, Hon. James J. Leff, Justice of the Supreme Court of New York, against conducting any proceedings in any of four actions related to a certain foreclosure action entitled *Isaias* v. *Ungar*. The petition alleged that Judge Leff was biased against the petitioners. The proceeding below also sought to vacate Judge Leff's order that a reference already begun before the Hon. Frank J. McNabb, Official Referee, and originally ordered by Mr. Justice Fine on March 19, 1971 to hear and report on the issue of the amount due to Nahim Isaias on a defaulted mortgage he holds from Ungar, go forward and be continued.

In a motion made simultaneously with such proceeding for prohibition, petitioners requested that the Appellate Division amend and clarify its remittitur dated July 1, 1971 in a case where it unanimously reversed a finding by *Fine*, J., made subsequent to his order of reference that a stipulation of settlement had been entered into by petitioners and the underlying plaintiff. Appellants requested in that motion to amend the remittitur, that the Appellate Division direct that a hearing be held and testimony be taken to determine whether or not a stipulation and settlement was made by the parties in open court finally disposing of the underlying actions. The Appellate Division unanimously denied the motion the same day it denied prohibition.

The Only Issue Presented

Does petitioner have an adequate state remedy with which to protect himself so as to interdict interference with pending state proceedings?

Respondent's Contentions Below

It was argued in the Appellate Division that not only was there no merit to the petitioners' contentions that Judge Leff had prejudged the case but that in any event petitioners had a proper and adequate remedy by way of taking an appeal from whatever final judgment Judge Leff might make.

Indeed, such an appeal has now been filed in the Appellate Division of the Supreme Court of New York. Both sides have perfected and it is scheduled to be argued on May 11, 1972. In the meantime, however, demolition of the buildings in question have been enjoined. The petitioner in the meantime has had the use of approximately $220,000 at the cost of (at worst—if he loses) 7%, the interest allowed by the Courts of New York in lawsuits. The interest rate in the market place for a corporation in the real estate business is substantially higher, as found by Judge Leff.

Underlying Facts of the Case

The Ungar interests (Sidney J. Ungar, S.J. Ungar Affiliates, Waterfront Stations, Inc., Sylvia K. Miller) are the owners by purchase, of the fee of certain parcels of real property. Various of the Ungar interests also purchased the first mortgages and are the owners thereof. A junior mortgage is owed by Isaias. It is undenied that said junior mortgage is in default. Isaias brought an action to foreclose same. After much litigation and after the Appellate Division reversal Judge Fine's order that there had been a stipulation of settlement, the case was transferred to an IC part and each of the subsequent motions came on to be heard before Judge Leff, the respondent.